

CRS Report for Congress

Received through the CRS Web

Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge

Updated April 26, 2002

Pamela Baldwin
Legislative Attorney
American Law Division

Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge

Summary

Congress is currently considering whether to permit drilling for oil and gas in the coastal plain of the Arctic National Wildlife Refuge, Alaska. This area is rich in wildlife and wilderness values, but may also contain significant oil and gas deposits. H.R. 4 passed the House with provisions authorizing ANWR oil and gas leasing. S. 388 would have authorized oil and gas leasing in the Refuge, but S. 517, the bill that passed the Senate on April 25, 2002, does not include ANWR provisions. Senate Amendments 3132 and 3133 to S. 517 would have included provisions similar to H.R. 4, but these amendments failed when the Senate disapproved cloture motions. As background to conference discussions, this report analyzes all of the ANWR-related proposals to date and the legal issues related to them.

If the current prohibition against production of oil and gas anywhere in the Refuge is repealed, then oil and gas development and related activities could occur not only on the federal lands, but also on Native lands within the Refuge. Although H.R. 4 contains a 2,000 acreage limitation on the development “footprint” in the coastal plain, this limitation would not apply to some, and possibly not to any, of the Native lands, in which case some or all of the more than 100,000 acres of such lands in the Refuge (inside and outside the officially designated coastal plain) could be developed. Absent statutory clarification, development on these lands could occur under existing standards, which many observers contend are lenient. The terms and environmental stipulations of a 1983 Agreement with the Arctic Slope Regional Corporation (ASRC), a Native Regional Corporation, would govern oil development on ASRC subsurface holdings in the Refuge, unless these provisions are superseded. ASRC chose to obtain their subsurface interests in the Refuge through land exchanges set out in this Agreement, which expressly made any oil and gas development of the lands contingent on Congress opening the Refuge, ASRC lands, or both, to such development. The 1983 Agreement also contains environmental stipulations that, while originally intended as beneficial requirements, may permit practices now regarded as undesirable. In addition, unless the relevant provisions of the Agreement were superseded by statutory language, it appears that the United States would have to obtain a court order to change an ASRC leasing plan whenever the United States and ASRC disagreed as to environmental harm.

The environmental standard used in both H.R. 4 and S. 388 — “no significant adverse effect” — has been used in the past, but could allow a range of effects before protection would be triggered, compared to other standards that have also been used. New leasing and environmental regulations would be developed and mineral leases sold on an accelerated schedule without new environmental impact studies. Many of the environmental constraints that would be imposed on leases in ANWR would be left to the discretion of the Secretary, whose discretionary acts would be more difficult to challenge under the strict standard of review in H.R. 4.

Both bills would share leasing revenues with Alaska, and both would establish new Funds with the federal share that would benefit energy research and mitigate coastal impacts. However, the provisions on disposition of leasing revenues in the House bill present issues related to the Alaska Statehood Act. If the disposition

provisions were enacted and later held by a court to be invalid, the revenues from leasing could be divided 90% to the State of Alaska and 10% into the federal Treasury, with no revenues going to conservation purposes.

The Senate bill would leave in place current authority permitting the export of oil coming from the Refuge via the Trans-Alaska Pipeline. H.R. 4 would direct the Secretary to prohibit export as one of the terms and conditions of leases.

Contents

Introduction	1
Background	1
Issues	4
I. Environmental Constraints.	4
(A). Administration of leasing	4
(B). Compatibility	7
(C). Environmental standard	7
(D). Technology standard	8
(E). Specific protections	8
(F). Possible Effects on International Polar Bear Agreement	12
(G). Discussion	14
II. Native Lands.	15
(A). The nature and history of Native rights in ANWR	15
(B). Current bill provisions and issues	22
III. Access, Rights of Way, and Exports.	29
IV. Compliance with NEPA.	31
V. Judicial Review.	33
VI. Disposition of Leasing Revenues.	33
VII. Proposed Senate Amendments on ANWR.	36
Senate Amendment 3132	36
Senate Amendment 3133	38

Legal Issues Related to Proposed Drilling for Oil and Gas in the Arctic National Wildlife Refuge

Introduction

Congress is currently considering whether to permit drilling for oil and gas in the coastal plain of the Arctic National Wildlife Refuge (ANWR), to designate the area as wilderness, or to retain the status quo.¹ Current law prohibits the production of oil and gas in the Refuge, but high prices for oil and natural gas have renewed debate over whether to open the Refuge to development. H.R. 4, of which Title V of Division F would authorize oil development in ANWR, passed the House of Representatives on August 2, 2001. Title V of S. 388 also would direct oil and gas development in the Refuge.² However, S. 517, which passed the Senate on April 25, 2002, does not authorize drilling in the Refuge, and therefore, the issue must be resolved in conference. Senate Amendment (S.Amdt.) 3132 and a second degree amendment to it, S.Amdt. 3133, contained provisions similar to H.R. 4, but with some differences. These amendments were not adopted.³

The landownerships and laws relevant to possible development in the Refuge are complex, and the policy choices controversial.⁴ The environmental protections provided in the bills and the effects on the Refuge and its wildlife that might result from oil and gas development are central to the debate on whether to open the Refuge to drilling. Legal issues that relate to possible development of the Refuge and the proposals regarding possible leasing in ANWR discussed in this report. This report will may be updated or revised as circumstances warrant.

Background

The Arctic National Wildlife Refuge is managed by the United States Fish and Wildlife Service (FWS) and consists of approximately 19 million acres located at the Northeast corner of Alaska directly adjacent to Canada. The coastal plain of the Refuge on the Beaufort Sea is approximately 1.5 million acres and is the part of the

¹See CRS Report RL31278, *Arctic National Wildlife Refuge: Background and Issues.*, M. Lynne Corn, coordinator.

²No committee reports are available for either bill as of the date of this report.

³148 Cong. Rec. S2,890 (daily ed. April 18, 2002).

⁴See CRS Issue Brief IB10073, *The Arctic National Wildlife Refuge: the Next Chapter*, by M. Lynne Corn, Bernard A. Gelb, and Pamela Baldwin.

Refuge that is richest in wildlife and migratory birds, including the Porcupine caribou herd, polar bears, musk oxen, eagles, snow geese, and many others. The coastal plain is directly east of Prudhoe Bay, a state-owned oil field that has provided a large volume of oil, and many experts believe that significant deposits of oil and natural gas may exist under the Refuge as well. The presence of biological and wilderness values together with the potential for large hydrocarbon deposits results in the current controversy over whether to allow oil drilling in the Refuge.

All lands in the North Slope were withdrawn January 22, 1943 by PLO 82.⁵ In November, 1957, an application for the withdrawal of lands to create an Arctic Wildlife Range was filed to protect the area's wealth of wildlife and migratory birds. Under the regulations in effect at that time, this application "segregated" the lands in question, removing them from disposal. This fact was important because on July 7, 1958, the Alaska Statehood Act was passed and on January 3, 1959, Alaska was formally admitted to the Union. On December 6, 1960 (after statehood), the Secretary of the Interior issued Public Land Order 2214, reserving the area as the Arctic National Wildlife Range.⁶

The Supreme Court has held that the initial segregation of lands before statehood was sufficient to prevent the passage of ownership of certain submerged lands within the Refuge to the State of Alaska at statehood.⁷ If this ruling had been in favor of Alaska, certain lands beneath the rivers in the coastal plain might have belonged to the state, which could have developed the resources in them, including the oil, gas, gravel, and water.

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA)⁸ to resolve Native claims against the United States. This Act provided the opportunity for the selection and conveyance of lands to Native groups – usually either the surface estate of lands to Native Village Corporations, or the subsurface estate to Native Regional Corporations, associated with the Village Corporations within each Region. Usually, the Regional Corporations could receive the lands beneath the Village Corporations in their area, but subsurface lands beneath refuges were not available, and in-lieu lands were substituted for them. Under § 22(g) of ANCSA, surface lands conveyed in refuges were subject to the regulations applicable to the particular refuge of which they were a part.

In 1980 Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA),⁹ which, among other things, renamed the Range¹⁰ to be the Arctic

⁵8 Fed. Reg. 1,599 (February 4, 1943).

⁶25 Fed. Reg. 12,598 (December 6, 1960). Other actions have changed the boundaries of the Refuge, but are not relevant to this analysis of leasing on the coastal plain.

⁷United States v. Alaska, 521 U.S. 1 (1997).

⁸P.L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601 *et seq.*

⁹P.L. 96-487, 94 Stat. 2374, 16 U.S.C. §§ 3101 *et seq.*

¹⁰President Carter by Proclamation 4729 of February 29, 1980 had renamed the Range "The (continued...)

National Wildlife Refuge, and expanded the Refuge to include an additional 9.2 million acres, mostly to the south.¹¹ Section 702(3) of ANILCA designated much of the original Range as a wilderness area, but did not include the coastal plain. Instead, Congress postponed decisions on the development or further protection of the coastal plain. Section 1002 of ANILCA designated a part of the coastal plain of the Refuge for study. (As a result this part of the plain is sometimes referred to as the “1002 area” or the “Coastal Plain.”) The 1002 area was administratively articulated as excluding the three townships of land belonging to the Kaktovik Inupiat Corporation (KIC), a Village Corporation.¹² However, these lands *geographically* are on the coast of ANWR, and are very important to the wildlife and scenic resources of the area. Pursuant to § 1431(g) of ANILCA, KIC was entitled to receive additional lands within the Coastal Plain. These additional lands total 19,588 acres. Section 1003 prohibited oil and gas development in the Refuge as a whole, and “leasing or other development leading to production of oil and gas from the range” unless authorized by an Act of Congress.¹³

In 1983 the United States and the Arctic Slope Regional Corporation (ASRC), a Native Regional Corporation, executed an agreement (“the 1983 Agreement”) embodying an exchange of lands under which ASRC would receive title to the subsurface estate beneath the KIC surface lands. Normally, ASRC would not have received these lands because they were in a refuge. By the terms of the 1983 Agreement, the ASRC lands in ANWR cannot be developed unless Congress opens ANWR, the ASRC lands, or both to oil development. Conversely, if Congress opens ANWR, then the more than 92,000 acres of Native lands (KIC surface/ASRC subsurface) in the four townships within the Refuge could be developed. These extensive Native holdings would be affected by the authorization of oil and gas

¹⁰(...continued)

William O. Douglas Arctic Wildlife Range.” ANILCA did not address this proclamation, but renamed the lands comprising the original Range and the added lands as the Arctic National Wildlife Refuge.

¹¹Section 303(2).

¹²Section 1002(b) of ANILCA defines the “coastal plain” as the area identified as such in the map entitled ‘Arctic National Wildlife Refuge’, dated August 1980.” The Refuge map published in the Federal Register Notice of the legal description of the boundaries of the Refuge does not show the native lands as excluded. (48 Fed. Reg. 7980 (February 24, 1983)). We are having trouble obtaining a copy of the original map of the Refuge certified in August, 1980 (the map referenced in the statute). One copy shows the boundaries of the KIC lands with the boundaries crossed out by hand, but without any explanation of when and by what authority these marks appeared or what their significance was intended to be with respect to the coastal plain. Maps certified in August, 1980 exist labeled Refuge and Wilderness, but we have not been successful in obtaining any map of that date that depicts the coastal plain labeled as such. Yet, when the legal description of the boundaries of the coastal plain (excluding KIC lands then conveyed) were published on April 19, 1983 (48 Fed. Reg. 16838), the introductory material asserts: “By virtue of the map referred to in section 1002(b)(1), lands in which the surface estate has already been conveyed to Kaktovik Inupiat Corporation ... are excluded from the coastal plain”

¹³It is not clear whether this language was intentional, but it may have been intended to allow preliminary activities in the additional lands that were added to the Refuge.

development on the coastal plain, and, in turn, could also affect the Refuge and its resources. In addition, there are individually owned Native allotments within the Refuge that might be developed if oil and gas drilling is allowed. All types of Native lands within the Refuge total more than 100,000 acres.

As interest in the possible leasing of the coastal plain has increased, review of several legal aspects of possible drilling in the Refuge appears timely.

Issues

I. Environmental Constraints.

One of the most controversial aspects of any consideration of possible leasing in the Refuge is what the environmental effects of leasing are likely to be. There have been vigorous assertions on both sides — either that the bills are highly protective of the environment, or that they are not. Hence the environmental aspects of the current bills are of particular interest. Some of the most critical elements in an analysis of the environmental provisions of the bills are: 1) the agency that would administer the leasing program; 2) the compatibility of leasing with the purposes of the Refuge; 3) the standard for environmental protection and how might it function in practice; 4) the level of industrial technology required; 5) the protections that would be statutorily provided with respect to the wildlife resources of the Refuge; and 6) the extent to which administrative decisions and actions implementing a leasing program were judicially reviewable. This last item will primarily be discussed later in this report under the heading “Judicial Review.”

(A). Administration of leasing. Under the National Wildlife Refuge System Administration Act (“Refuge Administration Act”) on the management of the National Wildlife Refuge System, it is the Secretary of the Interior acting — “through the United States Fish and Wildlife Service” — who is to administer Refuge lands.¹⁴ This language was added by Congress in 1976 to clarify that management of refuges could not be administratively assigned to other agencies.¹⁵ Under current law, when evaluating whether to approve an activity in a refuge, the Director of the FWS (or an FWS officer to whom the duties are delegated) may approve an activity only if it is compatible with the *major* purposes for which the System and the particular unit were created. Longer-term uses must be compatible with all the purposes, major or otherwise, of both the System and the particular unit.¹⁶ The Refuge Administration Act does not close refuges to possible oil and gas leasing, but many individual units are withdrawn and leasing is allowed on very few.

Although the Bureau of Land Management (BLM), another agency also in the Department of the Interior, is generally the mineral development manager for the

¹⁴16 U.S.C. § 668dd(a)(1).

¹⁵P.L. 94-223, 90 Stat. 199.

¹⁶16 U.S.C. 668dd(d).

United States,¹⁷ the Mineral Leasing Act does not specify that the Secretary of the Interior is to administer leasing through that agency. Current mineral leasing regulations recognize the authority of FWS over the wildlife resources on refuge lands and reserve considerable authority to the Director of FWS with respect to oil and gas leasing in Refuges:

(a)... Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(b)... [t]here is to be no drilling or prospecting under any mineral lease heretofore or hereafter issued on lands within a wildlife refuge except with the consent and approval of the Secretary with the concurrence of the Fish and Wildlife Service as to the time, place and nature of such operations in order to give complete protection to wildlife populations and wildlife habitat on the areas leased, and all such operations shall be conducted in accordance with the stipulations of the Bureau on a form approved by the Director [of the National Wildlife Refuge System].¹⁸

This protective posture is repeated in another regulation that provides:

Leases shall be issued subject to stipulations prescribed by the Fish and Wildlife Service as to the time, place, nature and condition of such operations in order to minimize impacts to fish and wildlife populations and habitat and other refuge resources on the areas leased. The specific conduct of lease activities on any refuge lands shall be subject to site-specific stipulations prescribed by the Fish and Wildlife Service.¹⁹

Given that there are no statutory requirements that mineral leasing be through the BLM, and that since 1976 there is a statutory requirement that management of refuges be by the Secretary through the FWS, it is not clear by what authority BLM is the lead agency with respect to leasing in refuges. Even if the Refuge Administration Act could be interpreted as only addressing the surface management of refuges, it can be asked whether the approval of the Secretary of leasing in refuges must be given through FWS, which is to say with the concurrence of the Director of FWS. We are not aware of any Departmental interpretation of these issues.

¹⁷See Secretarial Order 3087, December 2, 1982, as amended February 7, 1983 (48 Fed. Reg. 8983).

¹⁸43 C.F.R. § 3101.5-1.

¹⁹43 C.F.R. § 3101.5-4.

Under current procedures, refuges in Alaska that are open to leasing are not to be available until the FWS has first completed compatibility determinations.²⁰ A new compatibility policy and new regulations were published on October 18, 2000, and became effective November 17, 2000.²¹ “Compatible use” is defined as a “proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge.”²² Native lands in Alaskan refuges that are subject to certain restrictions under § 22(g) of ANCSA are expressly subject to the regulations on compatibility in 50 C.F.R. 25 and 26.²³

PLO 2214, which withdrew lands to create the original Arctic National Wildlife Range, withdrew the lands from operation of the mining laws, but not from the mineral leasing laws. Congress in § 1003 of ANILCA reserved to itself the decision of whether to lease the coastal plain area.²⁴ The current bills would authorize oil and gas leasing and address both management and compatibility.

H.R. 4 states in § 6503(a) that leasing is to be under the Mineral Leasing Act (MLA)²⁵ and administered by the Secretary — which term is defined in § 6502(2) as the Secretary of the Interior or the Secretary’s designee. As noted above, generally leasing under the MLA is conducted by the BLM, with conditioning authority in FWS when the leasing is in a refuge. Because there is no reference to the usual powers of the Director of FWS, and because, under § 6507 of H.R. 4, the Secretary is to impose the environmental stipulations through new leasing regulations, the role of the FWS is ambiguous.

However, in 1981, a court found the administrative assignment of responsibility for studying the coastal plain area under § 1002 of ANILCA to the United States Geological Survey rather than to FWS to be unlawful because the Refuge Administration Act requires that the Refuge System be administered by the Secretary of Interior through FWS, absent a clearly expressed legislative intent to the contrary.²⁶ H.R. 4 does not expressly assign leasing responsibilities to the BLM, although that result is implied by the reference to leasing being under the MLA. The bill also does not expressly modify the usual authority of FWS to manage and protect the Refuge resources and to condition mineral leases. Therefore, an argument can be made that FWS retains that authority, and would develop the environmental constraints on surface disturbance in the leasing regulations. However, the intent of Congress is not

²⁰43 C.F.R. § 3101.5-3.

²¹65 Fed. Reg. 62484 and 65 Fed. Reg. 62458, respectively.

²²50 C.F.R. § 25.12(a) and see 16 U.S.C. § 668ee, which is nearly identical.

²³50 C.F.R. § 25.21(b).

²⁴16 U.S.C. § 3143.

²⁵This language also raises issues in connection with the revenue-sharing provisions. See “Revenues” below.

²⁶*Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Ak. 1981), *aff’d* 690 F.2d 1279, 1307 (9th Cir. 1982).

clear in light of the fact that H.R. 4 directs the Secretary to develop environmental constraints but omits the direction that the Secretary act “through the Fish and Wildlife Service.” As the legislation evolves, the respective jurisdictions of BLM and FWS in this context may be clarified.

Section 503(a) of S. 388 expressly states that BLM, rather than the FWS, is to manage the leasing program. That section directs the Secretary, “acting through the Bureau of Land Management *in consultation with* the Fish and Wildlife Service and other appropriate Federal offices and agencies,” (emphasis added) to establish and implement an oil and gas leasing program that is to ensure that oil and gas production will result in no significant adverse effect on the wildlife and environment. Section 503(d) further states that the title (Title V) is to be the “sole authority” for leasing in the Refuge. These provisions more clearly place BLM in charge of both supervising leasing and developing and carrying out environmental constraints, a departure from the current posture of the law. The scope of authority left to the FWS to protect the wildlife resources of the Refuge from the effects of oil drilling is not clear, but appears to be less than under current law and regulations, where, as discussed above, the FWS can impose terms and conditions on leases.

Arguably, placing BLM in charge of the leasing program for ANWR and evidently reducing the otherwise applicable role of FWS could divorce the mineral development aspects from the biological/wildlife purposes and the expertise of FWS personnel, and may result in the coastal plain of ANWR receiving less protection than lands in other refuges do under current law and regulations.

Both the 1983 Agreement and many past bills in Congress continued responsibility for ANWR leasing with the FWS, subject to congressionally enacted direction. Pursuant to § 1002 of ANILCA, the FWS adopted regulations (see 50 C.F.R. Part 37) governing the exploratory activities that took place in the Refuge

(B). Compatibility. Both § 503(c) of S. 388 and § 6503(c) of H.R. 4 state that for purposes of the Refuge Administration Act, *the oil and gas leasing program and activities* in the coastal plain are deemed to be compatible with the purposes for which the Arctic National Wildlife Refuge was established, and that no further findings or decisions are required to implement this determination. (Emphasis added.) This provision both answers the compatibility question and appears to eliminate the usual compatibility determination processes. Arguably too, it raises additional ambiguities as to FWS authority to impose conditions on leases and as to what extent and by whom impacts resulting from activities occurring on Native lands may be regulated. (See Native Lands section below.) The general statement that leasing “activities” are compatible arguably may encompass a great many actions such as construction and operation of port facilities, staging areas, personnel centers, etc.

(C). Environmental standard. Both bills use “no significant adverse effect” on fish and wildlife, their habitat, subsistence resources, and the environment as the standard that is to guide leasing.²⁷ This phrase is not defined in either bill, but has been used in the past. It was used in § 1002 of ANILCA as the standard for the

²⁷See, e.g., § 503(a) of S. 388 and § 6503(a)(2) of H.R. 4.

limited exploration allowed under that section, throughout the 1983 Agreement, and in past bills that authorized leasing.²⁸ Arguably, it could be seen as analogous to the standard used in the National Environmental Policy Act (NEPA), which is “significant effect on the quality of the human environment.” (In practice this has been interpreted as addressing only significant *adverse* effects.) Although the contexts are different, judicial interpretation of NEPA may provide guidance in applying the standard contained in the ANWR bills.

The standard of significant adverse effects might allow considerable environmental harm before the threshold is crossed. Although the standard has been used before, Congress has also chosen other, more protective, language at times. For example, the language Congress used with respect to exploration in environmentally sensitive areas of the National Petroleum Reserve - Alaska was to “assure the maximum protection of such surface values consistent with the requirements of this Act for the exploration of the reserve.”²⁹ Another example of other language Congress has used is the Wilderness Act of 1964, which requires that mineral leases in wilderness areas “shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed.³⁰ A statute that addresses already existing mining rights in national parks requires that mining rights be “subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.³¹ In ANWR, Congress would be authorizing new leasing and hence would have greater latitude to impose a protective standard without infringing upon existing rights.

(D). Technology standard. Both bills require the use of the “best commercially available technology for oil and gas exploration, development, and production, on all new exploration, development, and production operations, and whenever practicable, on existing operations,” This means that the best commercially available technology will be required for initial installation and production, and should be phased into on-going operations, if practicable, as new technology develops. A computer search indicates that the phrase “best commercially available technology” is not currently used in the U.S. Code, and does not have any available judicial interpretation.³² Because it refers to technology that already is more

²⁸See H.R. 1320 and S. 1220, 102d Congress. H.R. 1320 defined the term as follows: “The term ‘significant adverse effects’ means those effects on habitat quality or availability which, despite the reasonable application of mitigation measures involving appropriate technology, engineering, and environmental control measures, including siting and timing restrictions, are likely to result in widespread long-term reductions in the natural abundance or distribution of a species of fish or wildlife on the coastal plain.”

²⁹42 U.S.C. § 6504(b).

³⁰Act of September 3, 1964, 78 Stat. 890, 893, 16 U.S.C. § 1133(d).

³¹P.L. 94-429, 90 Stat. 1342, 16 U.S.C. § 1902.

³²Several provisions in current law use the phrase “commercially available technology” and at least two provisions call for technological improvements above that standard. See 42

widely available, it may be a more lenient standard than “best available technology economically achievable,” or “best practicable control technology” — both of which standards are used in the Clean Water Act.³³

(E). Specific protections. Both bills contain provisions that would provide specific environmental protections. Many of these provisions leave much to the discretion of the Secretary. The evaluations of environment effects made by the Secretary, and the particular actions taken by the Secretary in the exercise of the Secretary’s discretion would be insulated under the House bill by the stringent provisions on judicial review. (See “Judicial Review” below.) This fact — that the Secretary’s environmental choices could be difficult to overturn — is relevant to many of the provisions discussed in this part.

Section 503 of S. 388 and § 6503(e) of H.R. 4 provide that the Secretary, “after consultation with the State of Alaska, City of Kaktovik, and the North Slope Borough,” is authorized to designate up to a total of 45,000 acres of the 1002 area as “Special Areas” and close such areas to leasing if the Secretary determines that they are of “such unique character and interest so as to require special management and regulatory protection.” However, closure is discretionary and designated areas may be leased if the Secretary limits or conditions surface use and occupancy by lessees.³⁴ This provision does not require consultation with the FWS, and the Secretary may implement the advice of state and local entities as to designation, special protection, and possible closure of unique and special areas.

The above-cited sections would impose an acreage limit of 45,000 acres (out of the 1.5 million coastal plain acres) that could be designated as Special Areas for optional special protection or closure. The House bill contains additional details, such as the direction in §6503(e)(1) that the Secretary designate the Sadlerochit Spring area, comprising approximately 4,000 acres, as a Special Area, and §6503(e)(2) that Special Areas be managed so as “to protect and preserve the area’s unique and diverse character including its fish, wildlife, and subsistence resource values.”

Both bills state that the closure authority in the bill is the sole source of closure authority.³⁵ This may eliminate any separate authority under the Refuge Administration Act to close areas, and also raises the question of whether closure is an available option if it is determined to be necessary to avoid jeopardizing a species under the Endangered Species Act. Possibly ESA-necessitated closures could exhaust

³²(...continued)

U.S.C. § 5906(b)(1) re non-nuclear energy research; 42 U.S.C. §§ 13331 and 13351 re clean coal technology.

³³33 U.S.C. § 1311.

³⁴The House bill also contains a paragraph (4) entitled “Directional Drilling,” which permits “horizontal drilling” under Special Areas. Although the two terms are similar in common usage, directional drilling may be the broader term and the same term should be used in both the caption and substance of the section. Section 503(f) of S. 388 also refers to horizontal drilling.

³⁵See §§ 6503(f) in H.R. 4 and 503(g) in S. 388.

the acreage available for closure, making that tool unavailable where closure is merely desirable to avoid harm, rather than crucial to survival of a species.

Section 6506(a)(2) of H.R. 4 and § 508(7) of S. 388 provide that the Secretary may close, on a seasonal basis, portions of the Coastal Plain to *exploratory* drilling activities as necessary to protect caribou calving areas and other species of fish and wildlife. There is no express authority for seasonal closures during the production phases of oil development in the Senate bill. However, § 6507(d)(2) of H.R. 4 authorizes “[s]easonal limitations on exploration, development, and related activities, where necessary, to avoid significant adverse effects during periods of concentrated fish and wildlife breeding, denning, nesting, spawning, and migration.” It is not clear what would need to be shown to demonstrate the *necessity* of seasonal closures, or to demonstrate effects sufficiently significant and adverse to justify closure. It also is not clear whether seasonal closure areas count toward the acreage limitation on closures.

Under both bills, the Secretary is to develop regulations to govern the leasing of the coastal plain. These leasing regulations are to be developed within 14 months under § 504(a) of the Senate bill and within 15 months under § 6503(g)(1) of H.R. 4. Under § 6504(e)(1) of the House bill, the first lease sale is to be held within 22 months after enactment and under § 506 of the Senate bill the deadline is within 20 months of enactment. See the heading “NEPA Compliance” below for a discussion of the fact that other bill provisions would eliminate comprehensive new environmental studies in order to achieve this accelerated leasing schedule.

The leasing regulations required under the House bill must include regulations that relate to the protection of the fish and wildlife, their habitat, subsistence resources, and the environment of the Coastal Plain.³⁶ Both bills would direct the Secretary to impose terms and conditions on leases to address environmental concerns, but there is little detail under the Senate bill. The environmental provisions would undoubtedly provide some protections, but the net import of some of the provisions is unclear.

For example, the reclamation standard in §§6506(a)(5) of H.R. 4 and 508(17) of S. 388 requires reclamation to a condition capable of supporting the uses which the lands were capable of supporting prior to exploration or development or “upon application by the lessee, to a higher or better use as approved by the Secretary.” Under general zoning law, “higher or better” uses are those that “bring the greatest economic return.”³⁷ Uses that are ‘higher and better’ than undeveloped wildlife habitat could include many conditions.

Under §§ 6506(a)(6) and 508(18), environmental conditions may be a part of a lease “as *required*” pursuant to previous sections. (Emphasis added.) This language may mean only as required to avoid “significant adverse effects.” There is no express authority to impose conditions that embody a margin of safety and it is not clear whether a court would read in that authority.

³⁶Section 6503(g)(1) and § 6507(c).

³⁷Black’s Law Dictionary (6th ed. 1990).

Section 6507(d) requires that the proposed regulations and lease conditions comply with all applicable provisions of Federal and State environmental law, which would include a broad range of requirements. However, the applicable laws governing management of refuges may be modified by the instant legislation, as indicated.

Section 6507(d)(1) of H.R. 4 requires protective standards “at least as effective as the safety and environmental mitigation measures set forth in items 1 through 29 at pages 167 - 169 of the “Final Legislative Environmental Impact Statement” (April 1987) on the Coastal Plain.” These measures also include many beneficial items, but some of the measures, by regulating certain activities may basically condone those activities – e.g. the provisions that address roads and other permanent infrastructure facilities, incinerators, marine facilities, docks, causeways, etc. Although the legislated language requires the new ANWR leasing standards to be “at least as effective as” the 1987 measures and therefore would allow more stringent measures, additional statutory requirements and guidance might provide clarity regarding some of those important infrastructure topics and to guide development on both the federal and the Native Lands in the Refuge.

Section 6507(a)(3) of the House bill would require that the Secretary ensure that:

the maximum amount of surface acreage covered by production and support facilities, including airstrips and any areas covered by gravel berms or piers for support of pipelines, does not exceed 2,000 acres on the Coastal Plain.

This provision would require that oil development facilities not occupy more than 2,000 acres on the Coastal Plain. The reference to surface acreage “covered by” production and support facilities may exclude facilities that are not touching the ground, e.g. the pipes in elevated pipelines. Two thousand acres is a small amount relative to the 1.5 million acre plain. However, given that under both bills the Secretary is required to lease not less than 200,000 acres in the first lease sale,³⁸ a greater footprint may prove necessary. Also, it is likely that oil development facilities will not be in a single, consolidated footprint, but scattered over a much larger area and connected by pipelines and possibly roads. Equally important, if oil and gas were discovered in commercial quantities, it appears that support and development facilities could be constructed on Native lands, and such construction arguably is not constrained by the 2,000 acre limitation.³⁹ If not, then more than an additional 23,000 acres within the coastal plain and over 100,000 acres of Native lands within the

³⁸See § 6504(d) in H.R. 4 and § 506 of S. 388.

³⁹The leasing program addresses leasing of the federal lands. Under the 1983 Agreement discussed in the following section of this report, the Arctic Slope Regional Corporation agreed that the terms of that agreement governing oil development on its lands could be modified by subsequent legislation on oil development in ANWR, but there is no indication in the House bill that the 2,000 acre limit on surface use in the coastal plain is intended to apply to the Native lands.

Refuge as a whole might be available for surface occupancy associated with oil development. (See “Native Lands,” below.)

The House bill in § 6507(b)(1) requires a site-specific analysis of the probable effects, if any, that drilling or related activities will have on fish and wildlife, their habitat, and the environment. (See the discussion of NEPA Compliance below.) Section 6507(b)(2) requires that a plan be implemented to avoid, minimize, and mitigate (in that order and to the extent practicable) any significant adverse effect identified under paragraph (1). This preference of avoiding adverse effects is clearly a protective posture. However, under § 6507(b)(3) this plan is to be developed “after consultation with” the agency or agencies having jurisdiction over matters mitigated by the plan. This last reference would be to the FWS, which has the authority under current law to develop and approve of such plans and activities, rather than to consult regarding them.

Section 6507(d)(3) requires that *exploration* activities be limited to the winter and be conducted by ice roads or other means that buffer the tundra, but then also provides that the Secretary may allow other exploration if special circumstances exist and the Secretary finds such exploration will have no significant adverse effect on the fish and wildlife, their habitat, and the environment of the Coastal Plain.

Similarly, § 6507(d)(4),(5),(7), and (12) relate to potential controls of roads, transportation, and air traffic disturbance, but no specific controls are enacted. Here too, the regulations will depend on the Secretary’s interpretation. This is also true with respect to the requirements for “appropriate” controls on explosives, sand and gravel extraction, etc.

The Senate bill does not elaborate on the terms and conditions to protect the environment, except to direct that leases may contain terms and conditions “as required” by § 503(a) of the bill — i.e., to avoid significant adverse effects.

It may also be asked what penalties would be available to enforce the environmental protections and other lease requirements. H.R. 4 does not specifically address penalties for violation of lease terms by a lessee. The bill does state that leasing in the Refuge would be under the MLA. The MLA provides for cancellation of leases for infractions,⁴⁰ and the MLA leasing regulations also provide civil and criminal penalties for leasing violations, including failure to comply with lease terms.⁴¹ Because of the ambiguity about the role of FWS regarding the leasing activities, it is not clear whether the penalties usually available for infractions on refuge lands would continue to apply in this context. If so, these include fines and imprisonment.⁴²

Under § 513 of S. 388, the Secretary is to diligently enforce all regulations and lease terms and under § 508(10), if a lessee of a non-producing lease fails to comply with any provisions of the act or any other law or leasing regulation, the lease may be

⁴⁰30 U.S.C. § 188.

⁴¹43 C.F.R. Subpart 3163.

⁴²16 U.S.C. 668dd(f) and (g).

canceled by the Secretary after 30 days notice. Under §508(11) of S. 388, a producing lease may be forfeited and canceled by any appropriate proceeding brought by the Secretary in any United States district court having jurisdiction under the provisions of that title.

Because § 503(d) states that it is the sole authority for leasing in the 1002 area, arguably the penalties available under the Refuge Administration Act would not be available for environmental infractions by a lessee.

To whatever extent only cancellation is available as a penalty for violation of lease terms, the absence of a gradation of penalties could make adequate enforcement of environmental protections difficult. Penalties for a specific violation of another law, such as the Clean Air Act, arguably would still be available under that law.

(F). Possible Effects on International Polar Bear Agreement.

Beginning in the sixties, concern grew regarding the protection of marine mammals, including the polar bear. In 1972, the Marine Mammal Protection Act (MMPA) was enacted. In 1973, the United States, Canada, Denmark, Norway and the former Union of Soviet Socialist Republics developed an international agreement on polar bear conservation.⁴³ This Agreement was ratified by the United States in 1976.

The Agreement prohibits the “take” of polar bears, which term is defined as “hunting, killing and capturing.”⁴⁴ Article III sets out five exceptions to the taking prohibition, which a party to the Agreement may allow. These exceptions include several relating to traditional take by a party’s nationals; take for scientific purposes, for conservation purposes, or to prevent serious disturbance of the management of other living resources.

Article II of the Agreement requires certain actions to protect habitat of the bears. Parties are to:

- 1) take “appropriate action to protect the ecosystem of which polar bears are a part;”
- 2) give “special attention to habitat components such as denning and feeding sites and migration patterns;” and
- 3) manage polar bear populations in accordance with “sound conservation practices” based on the best available scientific data.

Recently, some critics have asserted that oil and gas development in the Arctic may be inconsistent with or violate the Agreement in that such development could result in the death of polar bears. A draft report to Congress raised questions in this

⁴³Agreement on the Conservation of Polar Bears, T.I.A.S. No. 8409, 27 U.S.T. 3918 (Nov. 15, 1973) [hereinafter Polar Bear Agreement].

⁴⁴*Id.*, art.I(2).

regard.⁴⁵ One of the principal issues raised is that the MMPA permits the unintentional taking of polar bears incidental to other lawful activities. The draft report asserts that such take would be inconsistent with the Agreement because there is no exception for such take in Article I or III and “if a lethal take were to occur during activities conducted under incidental take authority, the United States arguably could be considered to not be in compliance with the Agreement.”⁴⁶

However, the argument can be made that all references to killing or taking polar bears in the Agreement, whether in the prohibition or the exceptions sections, are to intentional take. Given this fact, the argument could continue, it is not inconsistent with the Agreement for an implementing law to permit but regulate incidental take. That this could be an appropriate interpretation is bolstered by the wording of the discussion accompanying the recommendation to ratify the Agreement, which also discusses only intentional takes – whether through hunting, or for other specified reasons.⁴⁷ Furthermore, the State Department, in presenting the Agreement to the President for transmission to the Senate for its advice and consent, took the position that the MMPA provided adequate domestic legislation to implement the terms and provisions set forth in the Agreement.

However, a more generalized argument could be made that the combination of the MMPA and the opening of ANWR to leasing, with concomitant development of the Native coastal lands, either per se or as such development progressed in actuality, could violate the pledge by the United States to protect the ecosystem upon which the bears depend. In such an eventuality recourse would be available only to the other parties to the Agreement, but the argument exists as a policy argument against such leasing activities, and at least one commentator asserts that such leasing might result in an inconsistency with the Agreement, such that either the Agreement or the MMPA should be amended.

The Polar Bear Agreement does not authorize incidental take within the polar bear protection zone. Such takes are authorized under section 101(a)(5) of the MMPA. Because the Agreement does not now prohibit harassment, an inconsistency exists only to the extent such takes would be lethal, involve the capture of bears, or be a product of habitat degradation or destruction. Because there is potential for polar bears to be lethally taken incidental to activities such as oil and gas operations, it is necessary to either amend the Agreement or to amend the MMPA to prohibit such takes if consistency with the Agreement

⁴⁵Draft Report to Congress on Status of United States Implementation of the 1073 International Agreement on the Conservation of Polar Bears, Prepared by U.S. Fish and Wildlife Service, Alaska Region, October, 1997.

⁴⁶*Id.*, at 9.

⁴⁷Executive Rep. No. 94-34 (1976).

is the goal. Takes by harassment could still be allowed under the MMPA, consistent with the Agreement.⁴⁸

(G). Discussion. There are few specific requirements in either bill that address particular items of environmental concern, such as port and support facilities, airstrips, disposal of wastes, gravel mining, water sources, etc. Many details of the environmental constraints would be left to the leasing regulations that are to be developed by the Secretary with very little advance study and little statutory guidance other than the avoidance of significant adverse effects. The role of the FWS is ambiguous, but appears to be less than under its current authority. Many decisions relating to the protection of the fish and wildlife resources of the Refuge and the protection of the environment in general would be committed to the discretion of the Secretary, whose choices would be difficult to challenge under the strict standards for judicial review in the House bill. A gradation of penalties for wrongdoing by a lessee may not be available. The Senate bill provides only for a judicial cancellation of a producing lease as the recourse; the House bill provides for cancellation, but penalties under the MLA may also be available. It is unclear whether the currently available penalties for violations in refuges would be available. And, arguably, the reclamation standard provides that at the end of the potentially lengthy period of mineral leasing activity, restoration of lands to current wildlife uses would not necessarily be required.

II. Native Lands.

Both bills would repeal § 1003 of ANILCA, thereby permitting oil and gas development on both the federal Refuge lands and on the Native lands within the Refuge.⁴⁹ These Native lands total over 100,000 acres, and although some of the most important elements in assessing the possible impacts of opening ANWR to leasing involve the property interests of Native-Americans in the Refuge, this aspect of permitting leasing has been little discussed. Both Native individuals and Native Village and Regional Corporations have various interests relevant to the issue of oil drilling in ANWR.

(A). The nature and history of Native rights in ANWR.

ANCSA. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA) to resolve Native aboriginal claims against the United States. ANCSA provided for monetary payments and also created Village Corporations that received the right to select the surface estate to approximately 22 million acres of lands in close proximity to villages. A village located in or adjacent to a refuge could select a certain amount of surface lands within the refuge,⁵⁰ thereby maintaining traditional ways of life. Under §22(g) of ANCSA, lands chosen in pre-ANCSA refuges were subject to the laws and regulations governing the use of the refuge of which they were

⁴⁸Donald C. Baur, *Reconciling Polar Bear Protection under United States Laws and the International Agreement for the Conservation of Polar Bears*, 2 ANIMAL LAW 9, 85 (1996)(footnote omitted).

⁴⁹Section 503(b) of S. 388; § 6503(b) of H.R. 4. See Native Lands section below.

⁵⁰Section 12(a)(1); 43 U.S.C. § 1611(a)(1).

a part.⁵¹ The Kakovik Inupiat Corporation (KIC), a Village Corporation in the Refuge, received selection rights to three townships under ANCSA.⁵²

ANCSA also created Regional Corporations which could receive subsurface rights to some lands and full title to others. The Regional Corporations typically were entitled to lands beneath the Village Corporation lands with which they were associated. However, subsurface rights in National Wildlife Refuges were not available, but in-lieu selection rights were provided to substitute for such lands.⁵³ Even though the shareholders of a Village Corporation shared in the profits of the relevant Regional Corporation, the interests of a Regional Corporation in maximizing the economic development of its subsurface estate may not always coincide with the interests of a Village Corporation in possibly using the surface estate for subsistence hunting and other traditional uses.

ANILCA. The 1980 ANILCA contained many provisions that followed up on ANCSA. Section 1002 of ANILCA designated the “coastal plain” of the Refuge as “the area identified as such in the map entitled ‘Arctic National Wildlife Refuge,’ dated August, 1980.” The Refuge map published in the Federal Register Notice of the legal description of the boundaries of the Refuge does not show the native lands as excluded.⁵⁴ The map that is believed to be the original map referenced in the Act is a large foam-board panel that shows the three ANCSA-authorized KIC townships marked in the same manner as is the exterior boundary of the Refuge, but without any explanation of the intended meaning of the delineation. The boundaries of the pool of lands from which KIC selections could be made also is depicted, so the delineation could have been informational only, or could have been intended to connote something more. The KIC lands are not differentiated by color from the rest of the coastal plain or Refuge. The map of the Refuge published in the Federal Register Notice of the legal description of the boundaries of the Refuge does not show the native lands as excluded, and neither do the first generation paper maps from December, 1980. On the other hand, these maps are labeled only “Refuge” and “Wilderness,” and do not depict the coastal plain labeled as such.

Section 103(b) of ANILCA authorized the publication of a map and legal description of each change in land management status effected by this Act and “each such description shall have the same force and effect as if included in this Act ...” However, only minor boundary adjustments (stated as an increase or decrease of not more than 23,000 acres) were authorized, and only after notice in writing to the Congress. The legal description of the boundaries of the coastal plain published on April 19, 1983, excludes the three ANCSA-authorized townships of KIC lands. The introductory material to the legal description states: “By virtue of the map referred to in section 1002(b)(1), lands in which the surface estate has already been conveyed

⁵¹Section 22(g), 43 U.S.C. § 1621(g).

⁵²A “township” is a unit of the federal surveying system that is a block of land 6 miles on a side, divided into 36 mile-square sections, each of which contains 640 acres. Therefore, a township consists of 23,040 acres.

⁵³43 U.S.C. § 1611(a)(1).

⁵⁴48 Fed. Reg. 7980 (February 24, 1983).

to Kaktovik Inupiat Corporation ... are excluded from the coastal plain, and therefore, a permit issued pursuant to §1002(b)(1) cannot authorize exploration of those lands.”⁵⁵ However, at this time, the subsurface was still federal and its development was subject to federal regulation. Further, it is important to note that geographically the KIC lands are on the coastal plain and are important to the wildlife of the area.

Section 103(c) of ANILCA states that only the public lands within the boundaries of a conservation system unit are deemed to be included as a portion of the unit, and that conveyed Native (or state) lands shall be subject to the regulations applicable solely to the public lands within such units. This issue of separate regulations is addressed elsewhere in this report.

Under § 1431(g) of ANILCA, KIC was authorized to obtain additional lands, and obtained the rights to a fourth township in the 1002 area. As a result, KIC has surface rights to three townships along the coast of ANWR that are outside the 1002 area, and one township inside that area, all totaling approximately 92,160 acres. However, all of the KIC lands are within the Refuge as a whole and hence are subject to: 1) the restrictions on oil and gas development in § 1003 of ANILCA; and 2) under § 22(g) of ANCSA and § 1431(g) of ANILCA, to the laws and regulations governing the Refuge.

Section 1431(o) of ANILCA, captioned “Future Option to Exchange, etc.,” authorized the Arctic Slope Regional Corporation (ASRC), whose shareholders are Inupiat Eskimos, to obtain subsurface rights beneath the KIC lands in ANWR upon the occurrence of certain events. ASRC could obtain subsurface rights beneath lands belonging to villages in the National Petroleum Reserve-Alaska or ANWR, if parts of those two areas within a certain proximity to Native village lands were opened for commercial oil and gas development within 40 years of the date of ANILCA. Under this authority, ASRC would not have been authorized to obtain the subsurface beneath the KIC lands in the Refuge *until* ANWR was opened for commercial development. Furthermore, any oil and gas development of ASRC interests would be subject to protective regulations “consistent with the regulations governing the development of those lands with the Reserve or Range which have been opened for purposes of development”

1983 Agreement. However, instead of proceeding at some future date with an exchange under the §1431(o) authority, then Secretary of the Interior James G. Watt on August 9, 1983 (four months after publishing the legal description of the 1002 area that excluded the KIC lands), entered into an exchange agreement (known as the 1983 Agreement or the “Chandler Lake Agreement” – after lands acquired by the United States in the Gates of the Arctic National Park) using the general exchange authority of § 1302(h) of ANILCA. Under this Agreement, the United States received the surface rights to certain lands and ASRC received the subsurface rights beneath the KIC lands, but any oil and gas development of these lands was expressly contingent on Congress authorizing such development.

⁵⁵48 Fed. Reg. 16838, 16841, 16869 (April 19, 1983).

Section 1431(o)(4) of ANILCA provides that the Secretary may promulgate regulations regarding the subsurface estates acquired *pursuant to that subsection* to protect the environmental values of the Reserve or Range consistent with regulations governing the development of those lands within the Reserve or Range which have been opened for purposes of development, including § 22(g) regulations. However, that subsection of ANILCA did not apply to the ASRC exchange in ANWR since a different exchange authority was utilized. Instead, the 1983 Agreement contained considerable detail relating to exploration and environmental issues, thereby making those features a matter of contract law. ASRC also agreed in the 1983 Agreement that § 22(g) — and hence Refuge regulations — would apply to its lands, but with significant additional terms.

Also as part of the Chandler Lake Agreement, ASRC was given the contractual right to drill, within a certain window of time, up to three exploratory wells on the KIC lands outside the 1002 area. One test well was drilled within the specified time, but the results of that well have been kept confidential. However, full oil and gas development of the ASRC lands was prohibited until and unless Congress opened the Refuge, the ASRC lands, or both for such development.⁵⁶ Conversely, if Congress opens the Refuge, the Agreement provides that ASRC may proceed with development of its subsurface interests.

The Barrow Gas Field Transfer Act. The Barrow Gas Field Transfer Act of 1984⁵⁷ addresses several North Slope issues, primarily involving exchange agreements involving the Point Barrow gas fields, including a 1984 agreement on that subject. It also refers to the August 9, 1983 Agreement (the ASRC/ANWR Agreement), stating in §5(d):

All of the lands, or interest [sic] therein, conveyed to and received by Arctic Slope Regional Corporation pursuant to this section of the ASRC Agreement and pursuant to the August 9, 1983 agreement between Arctic Slope Regional Corporation and the United States of America shall, in addition to other applicable authority, be deemed conveyed and received pursuant to exchanges under section 22(f) of the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, 1621(f)).

The committee report accompanying this act states that one purpose of the act is to “ratify certain land exchanges and other agreements”⁵⁸ It also states that lands received by ASRC are to be regarded as though they had been obtained by an ANCSA exchange:

Subsection (d) provides that all lands or interests therein conveyed to the Arctic Slope Regional Corporation pursuant to this section or the Regional Corporation’s 1984 agreement and

⁵⁶Provisions B-1 and B-2 at 5-6 of Appendix 2 of the 1983 Agreement.

⁵⁷See P.L. 98-366, 98 Stat. 468, 471.

⁵⁸H.R. Rep. 98-843 at 1 (1984).

pursuant to the August 9, 1983 Agreement Between the Arctic Slope Regional Corporation and the United States are to be deemed conveyed and received pursuant to exchanges under section 22(f) of the Alaska Native Claims Settlement Act, as amended, in addition to other applicable authority. The purpose of this subsection is to ensure that the lands and interests in land received by Arctic Slope Regional Corporation in the two referenced exchanges are treated as lands received under section 22(f) exchanges, thereby, for example resulting in the applicability of subsection 21(c) and (d) [re taxation] and subsection 23(j) [re interim conveyances and underselections] of the Alaska Native Claims Settlement Act, as amended to the lands and interests in land so received.⁵⁹

The floor debates in both the House and Senate are very brief and focus almost exclusively on the Barrow gas provisions and related exchange agreements.⁶⁰

Arguably, if the exchange is made under §22(f) of ANCSA, the ASRC lands received under the 1983 Agreement are subject to §22(g) constraints (those specifying that Native lands in refuges remain subject to the laws and regulations governing the refuge of which they are a part) as a matter of law, rather than being a matter of contractual obligation.

Subsequently, the Department of the Interior began negotiations with several other Native corporations and their oil company partners to develop other exchanges for subsurface rights in ANWR. These actions raised the issue at the time of whether such exchanges were valid and whether they would preempt the authority of Congress to make the decision of whether to lease and develop the oil and gas resources of the coastal plain of ANWR⁶¹ by presenting Congress with exchanges that might result in pressure to open the Refuge. As a result, Congress addressed the issue in 1988.

1988 ANILCA Amendment. In 1988, Congress legislated to prevent any more exchanges by amending the general exchange authority in ANILCA that had been used as authority to complete the 1983 Agreement:

Nothing in this Act or any other provision of law shall be construed as authorizing the Secretary to convey, by exchange

⁵⁹*Id.*, at 7.

⁶⁰Rep. Seiberling describes the bill as “without controversy” and does not discuss the 1983 Agreement related to ANWR. 130 Cong. Rec. 16841 (June 18, 1984). Rep. Young states that the bill would ratify agreements, but only discusses the gas field agreements. *Id.*, at 16843. Similarly, discussion was brief on the Senate side and focused on the Barrow provisions. Sen. Stevens stated that the bill had been extensively reviewed by the Congress, the House and Senate hearings, and stated that the bill confirms that the lands received by ASRC under the August 9, 1983 Agreement are to be treated as received under ANCSA. 130 Cong. Rec. 19738 (June 28, 1984).

⁶¹*See, e.g.* the GAO Report: GAO/RCED-88-179 (September, 1988), *Consideration of Proposed Alaska Land Exchanges Should Be Discontinued.*”

or otherwise, lands or interest in lands within the coastal plain of the Arctic National Wildlife Refuge (other than land validly selected prior to July 28, 1987), without prior approval by Act of Congress.⁶²

The House Report addressed the validity of such exchanges, linked exchanges to the decision of whether to open the Refuge to oil and gas development, and reiterated the control of Congress over whether the coastal plain would be opened for oil and gas development. The Report states:

The committee believes that, under current law, the Secretary of the Interior does not have authority to administratively exchange lands within the coastal plain of the Arctic National Wildlife Refuge, as defined in Section 1002(b) of ANILCA. Congress clearly reserved to itself the sole prerogative to make the decision as to whether ANWR would be opened to oil and gas development and, if so, under what terms and conditions. Section 1003 of ANILCA states:

Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range [sic] shall be undertaken until authorized by an Act of Congress.

It is the Committee's view that the 96th Congress did not intend the Secretary's general exchange authority under Section 1302(h) to apply to the coastal plain of ANWR.⁶³

The Report goes on to discuss the fact that the Department continued to assert that it had complete and unilateral authority to trade away oil and gas rights, to allow exploratory drilling, and to waive the rights to bonus bids, rents and royalties without Congressional approval. Furthermore, it noted that the Department had engaged in "mega-trade" negotiations with six Alaska Native groups and their oil company partners for exchanges similar to the ASRC exchange of 1983, and had conducted a "conditional auction" for oil and gas rights to 73 tracts in the coastal plain of ANWR. Then the Report discussed the intent of the new provision:

Title II and section 201 are designed to preserve the status quo and to permit, as ANILCA intended, Congress to decide the future status of the coastal plain on the merits. Section 201 makes it clear that the "mega-trades" or any other exchanges, as well as any other prospective conveyances involving lands or interests in lands within the coastal plain may only be implemented after Congressional review and after securing

⁶²Pub.L. No. 100-395, 102 Stat. 979, 981, amending § 1302(h) of ANILCA; 16 U.S.C. § 3192(h)(2).

⁶³H.R. Rep. No. 100-262, Part 1 at 7-8 (1987).

legislative approval by an Act of Congress. However, this section is not intended to effect [sic] lands validly selected prior to July 28, 1987.⁶⁴

This reiteration of Congress' authority to make the decision regarding oil and gas leasing in the coastal plain of ANWR is repeated on p. 12 of the Report: "The Committee would note that the decision of whether to open the Arctic National Wildlife Refuge for oil and gas development is a decision which Congress has reserved for itself."

The Senate Report repeats the language in the House report regarding the fact that Congress reserved to itself the right to decide if and when oil and gas leasing would be permitted in ANWR and that the new legislation "would insure that such a congressional prerogative is preserved."⁶⁵

Subsequent legislative history (as in a later committee report commenting on a previous enactment) expressing an interpretation of a previous statute is not given much weight because, as the Supreme Court has put it, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."⁶⁶ However, the views of a later Congress incorporated into a later statute must be interpreted and applied, and are given great weight in statutory construction.⁶⁷ Still other statutes may be premised on a particular interpretation of an earlier statute. If so, the interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual.⁶⁸

The 1988 amendment to ANILCA seems somewhere between the latter two interpretive choices. The 1988 direction that no more lands could be conveyed in the coastal plain without congressional approval is stated as being premised on the fact that Congress reserved to itself, and reiterates the ANILCA authority, to make the decision regarding oil and gas development of that area. Exchanges like the 1983 one with ASRC were evidently regarded as predisposing the decision process, and hence Congress stepped in to legislate that no further conveyances were to take place unless and until Congress so authorized – in order to preserve its view of §1003 of

⁶⁴*Id.*, at 8-9. The Report states that the committee is aware that KIC, some individual Natives, and ASRC "through a land exchange agreement with the Department" had selected lands in the Refuge before July 28, 1987, and states that the Secretary may adjudicate the validity of those land selections and convey lands to those parties "to the extent such conveyances are otherwise lawful and proper." *Id.*, at 13.

⁶⁵S. Rep. No. 100-302 at 3 (1988).

⁶⁶*Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

⁶⁷*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969).

⁶⁸*Mount Sinai Hospital v. Weinberger*, 517 F. 2d 329, 343 (5th Cir. 1975), quoted with approval in *Bell v. New Jersey*, 461 U.S. 773, 785 n.12 (1983). See also *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382-387 (1982), relying on congressional intent to preserve an implied private right of action as the reason for a "savings clause" on court jurisdiction.

ANILCA. This later enactment and the reasons for it arguably are entitled to weight in interpreting whether any modification of the ANILCA reservation of authority for Congress to decide the question of oil and gas development of the coastal plain has occurred with respect to ASRC.

Final Selections. On March 17, 1993, lands were withdrawn by Public Land Order 6959 to allow KIC to make its final selections to complete its four townships in the Refuge.⁶⁹ Pursuant to § 22(h)(2) of ANCSA and § 1410 of ANILCA, the Order made more lands available than was KIC's entitlement, thereby providing some flexibility as to choices. This larger quantity of lands desired by KIC had been identified initially in an agreement effective January 22, 1993, before the PLO was issued. Those lands were withdrawn and, under the terms of the January agreement, KIC was then to have filed a selection application and simultaneously submitted a prioritization of land choices from which conveyances could be completed up to the amount of the entitlement. However, BLM advises us that it appears that no final prioritization list has yet been submitted, as of April 22, 2002. Therefore, the exact location of the last of the KIC (and hence ASRC) lands is not yet known.

In addition to the KIC and ASRC Native lands, there are also individual Native "allotments" within the coastal plain and elsewhere in the Refuge. Approval and conveyance of some allotments have been completed; other lands have been applied for, but may not be approved. BLM currently is compiling the exact locations, acreage, and status of these allotments and applications. It appears, based on a preliminary mapping, that allotments and applications for allotments are clustered primarily along the coast and near Sadlerochit Spring, both of which are considered vital wildlife areas. BLM reports that allotments range in size up to 160 acres each and that approximately 9,797 acres have been conveyed, with an additional 1,719.66 acres approved but still pending.

If allotments are conveyed under the provisions of ANCSA, they are expressly for the surface estate only. However, if a claimant qualified for and opted for a conveyance under previous statutes, the status of the mineral estate of a particular allotment would have to be checked. Nonmineral lands (in the sense of "hardrock" minerals such as gold, silver, etc.) were not to be available for selection, and typically the United States reserved any oil and gas.⁷⁰

(B). Current bill provisions and issues.

(1). Final conveyances to KIC. Both bills have identical language in §6510 of H.R. 4 and § 503(h) of S. 388 that authorizes the conveyance of final land selections to KIC. It will be recalled that congressional authorization to complete the

⁶⁹58 Fed. Reg. 14323 (March 17, 1993).

⁷⁰43 U.S.C. § 1617(a). BLM advises that all of the allotments are pursuant to the Act of May 17, 1906, ch. 2469, 34 Stat. 197, amended August 2, 1956, ch. 891, 70 Stat. 954, in which case they may be subject to restrictions on alienation. Oil and gas on all of these allotments is reserved to the United States. Other allotments are listed as approved pursuant to ANILCA; however, the status of the title of particular allotments and applications may not be clear at this time.

conveyances is required by the 1988 amendment to ANILCA. More than sufficient lands for identification of selections were made available in PLO 6959, as identified by KIC in the agreement effective January 22, 1993. (The bill provisions refer to section 2 of the PLO as setting out the available lands, but the correct reference is paragraph 1.) Neither bill directs that conveyance of the selected lands be in accordance with the January 22, 1993 Agreement, nor requires a prioritization by a date certain in order to clarify which lands will ultimately leave federal ownership. Consequently, unless language were added to impose a timetable on the finalization of selections, the final location of these lands could remain uncertain.

(2). Environmental constraints on Native lands. As discussed above, both bills address oil development activities in the coastal plain/1002 area, and provide some environmental controls. It is unclear to what extent the Native lands will be subject to the same or similar controls – whether whatever constraints are placed on the federal Refuge lands would also pertain to the Native lands within the Refuge, or, if not, what other constraints on environmental effects and development facilities might apply to the Native lands. These issues are vitally important to understanding the possible overall effects of oil development on the Refuge.

In considering this question, the various Native property interests must be considered separately: 1) the interests of KIC in the surface estate of lands, within the coastal plain and the Refuge as a whole; 2) the interests of ASRC in the subsurface (and related use of the surface), within the coastal plain and the Refuge; and 3) individual allotments in the coastal plain and Refuge.

As discussed above, one section of KIC lands is in the 1002/coastal plain; three sections are outside the coastal plain; all are within the Refuge as a whole.

(3). ASRC lands and the 1983 Agreement. Currently, ASRC has rights to the subsurface beneath the KIC lands, both within and outside the coastal plain. It is important to note that the 1983 Agreement and its appendices address oil exploration and development on the ASRC subsurface estate and provide that its terms will govern the development and oil production on those lands unless they are superseded by statutory provisions. Appendix 2, part 9 of the Agreement states that development and production activities undertaken on “ASRC lands” will be subject to statutory constraints. Specifically ASRC development:

shall be in accordance with the substantive statutory and regulatory requirements governing oil and gas exploration, including exploratory drilling, and development and production that are designed to protect the wildlife, its habitat, and the environment of the *coastal plain*, or the ASRC Lands, or both. (Emphasis added.)

Other provisions of the 1983 Agreement also pertain to environmental effects. Appendix 1 provides that the grant of lands to ASRC is subject to:

1. the requirements of the second sentence of § 22(g) of ANCSA, (which requires compliance with the regulations of the Refuge).

6. the covenant that ASRC will use the lands “in conformance with the ‘Land Use Stipulations’ attached as Appendix 2.

7. the covenant that ASRC “shall not use those lands, or the surface of those lands, in any manner that significantly adversely affects the fish and wildlife, their habitats, or the environment of those lands or Arctic National Wildlife Refuge lands”

Therefore, it appears that as a general matter, the environmental constraints of the bills applicable to the coastal plain arguably would apply to development of all ASRC lands, both within the coastal plain and outside it.⁷¹ The same standard — the avoidance of significant adverse effects — is used in the 1983 Agreement and in both bills.

However, absent express new statutory language that addresses the relationship of the new legislation to the 1983 Agreement and to particular management and land use considerations, issues may arise. Both bills currently speak in general terms on environmental constraints, leaving much to be fleshed out by the Secretary of the Interior in new leasing regulations for the Refuge. The 1983 Agreement contemplates that subsequent legislation and regulations may supersede its provisions. Yet, arguably, the current bills do not accomplish this, in that they postpone many decisions and aspects of oil and gas development to possible coverage in the leasing regulations that are to be developed. To whatever extent the congressional acts and administrative regulations do not clearly supersede the 1983 Agreement, its terms will govern oil development on the ASRC lands. And other provisions of the 1983 Agreement may still operate despite the general legislated environmental constraints with respect to ASRC oil development.

For example, the 1983 Agreement qualifies its general statement that statutory language on oil development in the coastal plain will supersede the Agreement, by stating in Paragraph B.9 of Appendix 2 (pp. 28-29) that certain provisions in Paragraph B.3(c) - (m) — that set out an approval process for a “plan of operations” for oil development — will remain in effect.⁷² This provision may mean that Congress would have to expressly address and change this plan approval process, or the terms of the Agreement may still govern. The referenced Paragraph B.3(c)-(m) provisions provide a special process for approval of a plan of operations for ASRC development under which if the Regional Director of Fish and Wildlife Service and ASRC disagree as to whether a part of a proposed plan would significantly adversely affect the wildlife, habitat, or environment of the ASRC lands or Refuge lands or would

⁷¹See Paragraph 4, p. 10 of the Agreement that states that Appendix 1 applies to the lands to be conveyed to ASRC, thereby incorporating by reference Paragraph 1 of Appendix 1 that applies 22(g) to ASRC lands and Paragraph 6 of Appendix 1, which requires compliance with the Land Use Stipulations of Appendix 2.

⁷²The agreement refers to “such” plans. This could refer either to exploration plans in Paragraph B.3, or it could refer to all plans — exploration or development — that are the subject of Paragraph B.9. A reading of B.9 as a whole would seem to indicate that the latter interpretation is more likely the correct one. Given the importance of this issue, Congress may wish to clarify this point.

otherwise be inconsistent with any provision of the Agreement, ultimately (after some prescribed exchanges of written points of view and negotiations) the United States must obtain a *court order* restraining implementation of the plan of operations, or else ASRC will have the right to implement the plan of operations as originally proposed or as subsequently modified. In other words, the opinion of ASRC as to harm will prevail unless the United States obtains the agreement of a court with its views in every instance.

Should ASRC assert that this provision remains in effect even if the Director of BLM, rather than the Regional Director of FWS is the responsible leasing official, this language appears to impose a difficult burden on the United States to assert and control adverse effects of leasing on Native lands. This burden, combined with the fact that the current bills do not address the 1983 Agreement and which of its terms are superseded, and do not contain specific environmental controls that would supersede the provisions of the Agreement, may result in some Agreement provisions that were intended as “state of the art” environmental constraints in 1983 becoming less than desirable standards today, in light of technological changes since 1983. For example, provisions in Appendix 2 of the Agreement speak to “reserve pits” and ponds as means for the disposal of wastes on the surface of the Refuge, while current practice is to reinject wastes underground, rather than using reserve pits. Other provisions in the Agreement also address environmental considerations in ways that might not be considered acceptable today. The Agreement specifically addresses, for example, the use of explosives, aircraft, fires, disposal of gray water on the surface of the Refuge, removal of water from streams, incineration, fuel pits, extraction of sand and gravel, and the type and location of support facilities. Depending on the specificity of the oil development regulations that the Secretary is to develop, some of these provisions of the Agreement that are not expressly superseded may ultimately function to permit pollution and the siting and use of facilities that might not be permitted under current practices.

S. 388 as introduced provides in §503(d) that the title on ANWR leasing “shall be the sole authority for leasing on the 1002 Area.” It is not clear how this statement relates to the 1983 Agreement — whether it applies only to leasing of the federal lands, or totally supersedes the 1983 Agreement with respect to oil development activities on ASRC lands.⁷³ If it does, then what constraints might apply to development of the ASRC holdings in the coastal plain is unclear. If the 1983 Agreement does not apply, then arguably neither its stipulations, nor § 22(g) apply. While § 503(h) of S. 388 mentions the 1983 Agreement with respect to conveyance of the remainder of KIC and ASRC lands, it does not otherwise address the Agreement or issues relating to the Native holdings.

Some bills in previous Congresses have specifically addressed oil development-related activities on Native lands within the Refuge and expressly set out development limitations and specifications, together with expedited judicial review of possible Native claims for breach of contract or “takings” under the 5th Amendment of the Constitution. See *e.g.*, H.R. 3601 in the 100th Congress and H.R. 1320 in the 102d

⁷³Section 503 of the bill refers to the 1983 Agreement, but only with reference to confirming the subsurface rights ASRC is to take beneath lands that section directs be conveyed to KIC.

Congress, which limited port facilities and other development support activities and directed the promulgation of Refuge-wide regulations within a specified time. While both current bills repeat many of the provisions of bills from the 102d Congress that relate to what should be covered in leasing regulations, they omit other provisions that related to specific environmental constraints, development of the ASRC lands and expedited review of Native claims.

(4). Section 22(g) constraints. Both the KIC and ASRC lands are currently subject to § 22(g) of ANCSA, and hence to the laws and regulations governing ANWR; the KIC lands by the terms of ANCSA, and ASRC lands by the terms of the 1983 Agreement and, arguably, the 1984 Barrow Gas Field Act. Beginning in 1973, analysis of how § 22(g) might apply to Native lands in a refuge concluded that, because the lands were privately-owned, separate regulations were appropriate: one set of regulations should govern the public use of the public lands within a refuge and separate regulations should govern what could be done by Natives on their lands. The latter regulations should also reflect the fact that the Native lands had been conveyed under a statute (ANCSA) to accomplish a settlement “in conformity with the real economic and social needs of the Natives” and with their maximum participation.⁷⁴

This interpretation – that separate regulations were appropriate – was confirmed by certain aspects of ANILCA, notably language in § 103(c) which states that only

those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units

“Federal lands” is defined in §102(2) as lands the title to which is in the United States, and “public lands” is defined in §102(3) as federal lands, except lands selected by a Native Corporation but not yet conveyed, or lands referred to in section 19(b) of ANCSA (certain entitlements of Village Corporations). Therefore, it appears that special regulations applicable to Native lands in refuges are appropriate to implement 22(g).⁷⁵

Before the development of separate compatibility regulations for lands subject to § 22(g), several exchanges, including the ASRC exchange, had contained land-use stipulations to attempt to clarify what could and could not be done on the Native lands. Because § 22(g) requires compliance with the laws and regulations pertaining to the particular refuge of which the Native lands are a part, any law enacted to lease ANWR could impose some constraints on the Native lands and special regulations governing those lands might also be developed.

⁷⁴Opinion to the Director, Bureau of Sport Fisheries and Wildlife from the Acting Associate Solicitor for Conservation and Wildlife, September 11, 1973.

⁷⁵See Memorandum from Attorney, Office of the Regional Solicitor, Alaska Region to the Regional Director, Alaska Region, Fish and Wildlife Service, February 17, 1983.

Current 43 C.F.R. § 2650.4-6 states that regulations governing the use and development of refuge lands conveyed pursuant to § 14 of ANCSA “shall permit such uses that will not materially impair the values for which the refuge was established.” This appears to be a standard that would allow a considerable range of activities.

The new compatibility regulations address §22(g) lands and state that compatibility determinations for those lands are to be made in compliance with the requirements stated in the regulations, several of which are relevant to this report. Notably, the regulations state, for example, that only the effects on refuge lands that result from a use made on Native lands, not the use on the Native lands itself, will be considered, and that the Refuge management plan will not include the Native lands:

(1)(i) Refuge managers will work with 22(g) landowners in implementation of these regulations. The landowners should contact the Refuge Manager in advance of initiating a use and request a compatibility determination. After a compatibility determination is requested, refuge managers have no longer than ninety (90) days to complete the compatibility determination and notify the landowner of the finding by providing a copy of the compatibility determination or to inform the landowner of the specific reasons for delay. If a refuge manager believes that a finding of not compatible is likely, the Refuge Manager will notify the landowner prior to rendering a decision to encourage dialog on how the proposed use might be modified to be compatible.

(ii) Refuge managers will allow all uses proposed by 22(g) landowners when the Refuge Manager determines the use to be compatible with refuge purposes.

(iii) Compatibility determinations will include only evaluations of how the proposed use would affect the ability of the refuge to meet its mandated purposes. The National Wildlife Refuge System mission will not be considered in the evaluation. Refuge purposes will include both pre-ANILCA purposes and those established by ANILCA, so long as they do not conflict. If conflicts arise, ANILCA purposes will take precedence.

(iv) A determination that a use is not compatible may be appealed by the landowner to the Regional Director. The appeal must be submitted in writing within forty-five(45) days of receipt of the determination. The appeals process provided for in 50 C.F.R. 36.41(i)(3) through (5) will apply.

(v) Compatibility determinations for proposed uses of 22(g) lands will only evaluate the effects of the use on the adjacent refuge lands, and the ability of that refuge to achieve its purposes, not on the effects of the proposed use to (sic) the 22(g) lands.

(vi) Compatibility determinations for 22(g) lands that a use is compatible are not subject to re-evaluation unless the use changes significantly, significant new information is made available that could affect the compatibility determination, or if requested by the landowner.

(vii) Refuge comprehensive conservation plans will not include 22(g) lands and compatibility determinations affecting such lands will not be automatically re-evaluated when the plans are routinely updated.

(viii) Refuge special use permits will not be required for compatible uses of 22(g) lands. Special conditions necessary to ensure a proposed use is compatible may be included in the compatibility determination and must be complied with for the use to be considered compatible.

.....

(g) Except for uses specifically authorized for a period longer than 10 years (such as rights-of-ways), we will re-evaluate compatibility determinations for all existing uses other than wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or at least every 10 years, whichever is earlier. In addition, a refuge manager always may re-evaluate the compatibility (sic) of a use at any time.

(h) For uses in existence on November 17, 2000 that were specifically authorized for a period longer than 10 years (such as rights-of-ways), our compatibility re-evaluation will examine compliance with the terms and conditions of the authorization, not the authorization itself. We will frequently monitor and review the activity to ensure that the permittee carries out all permit terms and conditions. However, the Service will request modifications to the terms and conditions of these permits from the permittee if the Service determines that such changes are necessary to ensure that the use remains compatible. After November 17, 2000 no uses will be permitted or re-authorized, for a period longer than 10 years, unless the terms and conditions for such long-term permits specifically allow for modifications to the terms and conditions, if necessary to ensure compatibility. We will make a new compatibility determination prior to extending or renewing such long-term uses at the expiration of the authorization. When we prepare a compatibility determination for re-authorization of an existing right-of-way,

we will base our analysis on the existing conditions with the use in place, not from a pre-use perspective.⁷⁶

These regulations, and the 1983 Agreement, could allow a considerable range of development on the KIC and ASRC lands, unless superseded or elaborated on by new statutory and regulatory leasing provisions. Both H.R. 4 (§6503(c)) and S. 388 (§503(c)) provide that oil and gas leasing in the Refuge is found to be compatible with the purposes of the Refuge and no further findings or decisions are required to implement this determination. The exact effect of this statutory finding on the scope of possible regulation under §22(g) is not clear.

(5). Allotments. Allotments, it will be recalled, are lands the surface of which are owned by individuals. In most, if not all instances, the United States retained the oil and gas rights beneath allotments, but the surface is in non-federal ownership and can be developed. Allotments within the Refuge are not subject to the requirement of §22(g) of ANCSA that uses on Native lands chosen under that Act comply with the regulations of the Refuge.

Therefore, the uses that an allottee might make of these lands or permit to be made of these lands could have significant impacts on the Refuge — if oil development were allowed, allotments could be used for staging areas, port development, or refuse storage. Therefore, the size and location of allotments is relevant to assessing the possible overall effects of oil development on the coastal plain and the Refuge. As noted above, some patented allotments are located on the coast and in the Sadlerochit Spring area. BLM advises that 9,797 allotment acres have been conveyed in the Refuge and another 1,720 acres have been approved.

Other statutes relating to the management of environmentally sensitive federal conservation units have provided for regulation of valid existing rights and inholdings. For example, the Wilderness Act authorizes mineral leasing under “such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased”⁷⁷ Congress also subjected existing mining rights in national parks to “such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.”⁷⁸

Neither bill addresses individual allotments within the Refuge — e.g., by providing for regulated access and use, or for buying them out, etc.

(6). Timing. Both bills would repeal the § 1003 prohibition against oil and gas development in the Refuge, thereby allowing such development. Neither bill currently contains any time limitations on activities on Native lands leading to development or production, even though leasing regulations for the federal lands are not to be

⁷⁶50 C.F.R. § 25.21 at 65 Fed. Reg. 62481-62482.

⁷⁷16 U.S.C. § 1133(d).

⁷⁸16 U.S.C. § 1902.

finalized for either 14 or 15 months. As discussed above, neither bill expressly addresses the provisions of the 1983 Agreement and which of its provisions are expressly superseded. Therefore, it is not clear that ASRC must wait until the federal leasing regulations are completed before moving forward in accordance with the terms of the 1983 Agreement. It will be recalled that an exploratory well was already drilled on KIC lands and some oil companies could be ready to move forward immediately on the Native lands. Express provisions addressing this issue of timing could ensure a fair start under the same rules.

III. Access, Rights of Way, and Exports.

Title XI of ANILCA provides for rights of way across federal conservation areas for transportation and utility systems. Section 6509(a) of H.R. 4 provides that Title XI of ANILCA “shall not apply to the issuance by the Secretary under section 28 of the Mineral Leasing Act ... of rights-of-way and easements across the Coastal Plain for the transportation of oil and gas.” Because the House bill also states that leasing is to be under the MLA, the intent appears to be that rights of way on the Coastal Plain be issued under the MLA.

However, subsection (b) of § 6509 requires that terms and conditions on rights of way or easements to transport oil and gas ensure that such transportation does not result in a significant adverse effect on the fish and wildlife, subsistence resources, their habitat, and the environment of the Coastal Plain. Current 30 U.S.C. § 185(h) requires that the Secretary impose stipulations on the right of way that are “designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat),” This standard in current law appears to be more protective than that in the House language.

Section 512 of S. 388 directs that “[n]otwithstanding Title XI of ANILCA, the Secretary is authorized and directed to grant in accordance with parts of § 28 of the MLA rights of way and easement across the 1002 Area for the transportation of oil and gas — again with terms and conditions to avoid significant adverse effects. The same comments can be made about the Senate bill language with respect to the environmental standard, as were made regarding the House language. The leasing regulations required by § 504 of the title are to include provisions on rights of way and easements.

The parts of § 28 of the MLA that the Senate bill states are applicable to rights of way in the Coastal Plain are subsections (c) through (t) and (v) through (y). This choice eliminates subsection (u) that generally prohibits the export of domestically produced oil transported by pipeline over rights of way granted under the MLA unless the President determines it is in the national interest to do so. Subsection (s), which is retained, reverses this policy posture on oil exports with respect to oil transported by pipeline through the Trans-Alaska Pipeline System (TAPS). Such oil *can* be exported unless the President determines that export is *not* in the national interest. It has generally been assumed that oil from ANWR would be piped over to the TAPS for transport south to the port of Valdez. If so, then under the Senate bill, ANWR oil could be exported unless the procedures set out in 30 U.S.C. § 185(s) are complied with. Section 6506(a)(8) of H.R. 4 would direct that leases prohibit the export of oil produced under a lease.

The rights of way language in the House bill addresses only the transportation of oil and gas by pipeline. However, any use of the surface of the federal lands is a “right of way,” not just those uses for the transportation of oil and gas. The areas occupied by drilling pads or other oil development structures, for example, would require a right of way or easement, yet the bill does not address these other situations or specify which other law is to govern. Although the House bill provides that leasing is to be under the MLA, the MLA provisions on rights of way only address pipelines. As discussed in the first section of this report, ambiguities remain as to which agency would otherwise be the managing/permitting authority and with what scope of authority, hence it is not clear under the House bill which laws and regulations would pertain to non-pipeline rights of ways used in connection with leasing activities. Title XI of ANILCA provides a process for obtaining rights of way for transportation and utility systems in federal conservation areas in Alaska (which term includes refuges), and the Refuge Administration Act provides at 16 U.S.C. § 668dd(d)(1)(B) that the Secretary (acting through the FWS) may grant easements across or upon refuge lands. Whether this provision would come into play depends again on how the management division between BLM and FWS is interpreted.

Neither bill expressly addresses access to the Native inholdings in the Refuge. As discussed, there are individual allotments scattered in the Refuge that might be developed once the Refuge is open to oil and gas development. Under § 1110(b) of ANILCA, notwithstanding any other law, the Secretary is to grant access rights to the owner or occupier of inholdings in conservation system units.⁷⁹ The access rights are to be:

as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.⁸⁰

As noted, the Refuge Administration Act provides that the Secretary (acting through the FWS in that instance) may provide permit or grant easements across or upon areas within the Refuge System, but because of the “notwithstanding” language in the ANILCA access provision, arguably this statute would not apply to access easements.⁸¹

⁷⁹Under § 1323 of ANILCA, (16 U.S.C. § 3210), the Secretary of the Interior is to provide access to nonfederally owned land surrounded by national forests or public lands managed under the statute that usually governs BLM lands — the Federal Land Policy Management Act (FLPMA). However, because BLM would be administering leasing in the Refuge under the current bill proposals, rather than managing the Refuge lands under FLPMA, this ANILCA access provision appears not to apply.

⁸⁰16 U.S.C. § 3170(b).

⁸¹Congress has at times regulated access to inholdings in other conservation areas. For example, under 16 U.S.C. § 1134(b), access to inholdings in designated wilderness areas is allowed “by reasonable regulations consistent with the preservation of the area as wilderness, ... by means which have been or are customarily enjoyed with respect to other such areas similarly situated.”

IV. Compliance with NEPA.

Some observers question whether the existing final legislative environmental impact statement (FLEIS), prepared in 1987 to comply with the National Environmental Policy Act (NEPA), is adequate to support development now, or whether an updated or new EIS should be prepared. A court in a declaratory judgment action in 1991⁸² held that the DOI should have prepared a Supplemental Environmental Impact Statement (SEIS) at that time to encompass new information about the 1002 area in connection with the Department's recommendation that Congress legislate to permit development. Therefore, it seems clear that either an SEIS or a new EIS would have to be prepared before development, unless Congress changes this requirement. Both Senate and House bills address the issue of the EIS and future application of NEPA.

Section 505 of S. 388 states that the Congress finds the 1987 EIS adequate to satisfy the legal and procedural requirements of [NEPA] with respect to the actions authorized to be taken by the Secretary of the Interior in developing and promulgating the regulations for the establishment of the leasing program, to conduct the first and subsequent lease sales, and to grant rights-of-way and easements to carry out the title. This language appears to eliminate the need to redo or update an EIS for the leasing program and regulations. Yet, at the same time, under § 503(a), the Secretary is directed to impose terms and conditions on leases to ensure that oil exploration and development in the 1002 area will result in no significant adverse effect on fish and wildlife, their habitat, subsistence resources, and the environment. If knowledge of environmental conditions has changed since 1987, developing lease terms and conditions adequate to avoid significant adverse effects might be difficult without more current studies. The bill language does not prohibit completion of such studies; it eliminates any legal requirement to do so for lease sales and with respect to grants of rights of way and easements. For example, even as to the granting of rights of way regarding which NEPA documents need not be prepared, the Secretary, under § 512 of S. 388 is to "impose such terms and conditions as may be necessary so as not to result in a significant adverse effect on the fish and wildlife, subsistence resources, their habitat, and the environment of the 1002 area." However, it could be difficult to develop terms and conditions for particular rights of way without the benefit of site-specific studies of the environmental effects of various alternatives.

It is not clear whether the necessity to prepare NEPA documents for decisions other than the issuance of leasing regulations, lease sales, or grants of rights of way is eliminated. (For example, are new terms and conditions for leases to be viewed as a part of "lease sale?") Some level of NEPA documents may still be required for other types of decisions and for consideration of site specific impacts of particular decisions. Under current NEPA regulations, an agency should prepare an Environmental Assessment to determine if an EIS is necessary, or merely to guide agency decisions.⁸³

Section 6503(c)(2) of H.R. 4 deems the 1987 EIS adequate with respect to actions authorized to be taken by the Secretary to develop and promulgate the

⁸² NRDC v. Lujan, 768 F. Supp. 870 (D.D.C. 1991)

⁸³40 C.F.R. Part 1500.

regulations for the establishment of a leasing program. Yet § 6503(c)(3) requires the Secretary to prepare a full EIS with respect to other actions authorized by the title. This is noteworthy because only the smaller document, an environmental assessment, might normally be sufficient, depending on the magnitude of the action involved. The section goes on to say that the Secretary is to identify only a preferred action for leasing and a single alternative and analyze only those two choices, and to consider public comment only on the preferred alternative. Public comments must be submitted within 20 days of publication of the analysis. The first analysis on the first lease sale is to be completed within 18 months of enactment. Compliance with paragraph (3) is stated as satisfying all requirements for consideration and analysis of environmental effects. However, paragraph (3) both directs the preparation of an EIS for all actions authorized by the title, yet also speaks as though it is only meant to address proposals for lease sales, so the intended import is not clear.

V. Judicial Review.

The current bills contemplate prompt action to put a leasing program in place. Toward that end, both S. 388 and H.R. 4 have a section on expedited judicial review. Section 511 of the Senate bill and § 6508 of H.R. 4 are alike in several respects; they both require that judicial review be sought within 90 days from the date of the action being challenged or the date the complainant knew or reasonably should have known of the grounds for the complaint. Section 6508 (a)(1) and (a)(2) as currently written contradict each other in that one states that suits challenging any action of the Secretary under the title must be filed in the appropriate district court of the United States [subsection (a)(1)] and in the United States Court of Appeals for the District of Columbia [subsection (a)(2)]. Section 511 of the Senate bill provides for suits generally to be filed in any appropriate district court of the United States except that a complaint seeking judicial review of an action of the Secretary *in promulgating regulations* under the Act may only be filed in the United States Court of Appeals for the District of Columbia. Possibly this same distinction between the two courts is what was intended in the House bill.

Both bills provide that actions of the Secretary that could have been reviewed under the section on judicial review may not be reviewed as part of a civil or criminal enforcement proceeding.

In addition, H.R. 4 also limits the scope of review by stating that review of a Secretarial decision to conduct a lease sale, including the environmental analysis thereof, shall be limited to whether the Secretary complied with the terms of Division F of the leasing statute and shall be based upon the administrative record of that decision. Furthermore, under §6508(a)(3), the Secretary's identification of a preferred course of leasing action and the Secretary's analysis of environmental effects is "presumed to be correct unless shown otherwise by clear and convincing evidence to the contrary." The requirement of clear and convincing evidence in this context differs from the usual standards for proof and may be confusing,⁸⁴ but appears to be intended to make overturning a decision difficult.

VI. Disposition of Leasing Revenues.

Another issue that has arisen during debates over leasing in the ANWR is that of disposition of possible revenues — whether Congress may validly provide for a disposition of revenues other than the 90/10 percent split mentioned in the Alaska Statehood Act.

Under § 35 of the Mineral Leasing Act (MLA),⁸⁵ an act that applies to the leasing of oil and gas and certain other minerals from federal public lands, certain western states receive directly 50% of revenues. An additional 40% goes to those states indirectly through the construction and maintenance of irrigation projects under the Reclamation Act of 1902. These percentages previously were 37 ½% and 52 ½%

⁸⁴See Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE, § 10.8 (2d ed. 1997).

⁸⁵Act of February 25, 1920, ch. 85, 41 Stat. 450, 30 U.S.C. §191.

respectively. Because the territory of Alaska did not benefit from the Reclamation Act, it initially received only a 37 ½% share of federal leasing revenues. Before enactment of the Alaska Statehood Act, Congress amended the MLA to provide that the territory of Alaska would receive an additional 52 ½% share, thereby putting Alaska on the same footing as the other states, receiving a total of 90% of revenues from leasing under the MLA.⁸⁶ Section 28(b) of the Alaska Statehood Act again amended the MLA to change the references from the territory of Alaska to State of Alaska.⁸⁷

Section 317 of the Federal Land Policy Management Act of 1976 again amended the revenues section of MLA to direct payment of 90% to Alaska, rather than the separate percentages previously stated.⁸⁸ The committee report accompanying the 1976 change states, under a heading regarding changes to distribution of revenues from MLA operations, that the action was intended to clarify that Alaska was to continue to receive 90% of the mineral revenues taken in from lands in Alaska.⁸⁹

Alaska has asserted that the 90% total referenced in the Statehood Act cannot be changed and must always be paid to the state because the Statehood Act is a compact between the prospective state and the federal government. Others assert that the Statehood Act provision was a technical one, meant to recognize that Alaska should receive a share comparable to that of other states sharing revenues *under the MLA*, but does not preclude the Congress from changing the MLA or at times making special provision for leasing certain areas under a different regimen.

Alaska sued in the U.S. Court of Federal Claims, asserting that because the United States had an obligation under the Statehood Act both to maximize mineral leasing in Alaska and to always pay a 90 % share of *gross* receipts to Alaska, the United States had either breached the contract established by the Statehood Act, or “taken” property of Alaska by withdrawing some lands in Alaska from leasing (notably ANWR), and by deducting administrative costs prior to the disbursement of the 90% revenues to the State. The court found that the Statehood Act and the previous statute providing the territory of Alaska with the same shares as the other states “simply plugged [Alaska] into the MLA, along with the other States.”⁹⁰ Therefore, Congress could amend the MLA, *e.g.*, to provide a different way of calculating receipts, and the changes would lawfully pertain to Alaska. Furthermore, the court concluded that the United States did not promise in the Statehood Act to make federal mineral lands productive of royalty revenues for the State, and that the

⁸⁶P.L. 85-88, 71 Stat. 282 (1957). 37 ½ % was to be spent for the construction and maintenance of public roads or for the support of public schools or other public educational institutions as the legislature of the territory may direct. The 52 ½ % was to be paid to the territory to be disposed of as the legislature directed.

⁸⁷P.L. 85-508, 71 Stat. 339, 351.

⁸⁸P.L. 94-579, 90 Stat. 2743, 2770-2771.

⁸⁹H.R. Rep. No. 94-1724 at 62 (1976).

⁹⁰Alaska v. United States, 35 Fed. Cl. 685, 701 (1996).

United States therefore retained discretion over leasing decisions.⁹¹ Because of these findings, the court also granted the government's motion for summary judgment on the takings claim. Although this case was in the context of the power of the United States to pay administrative costs before dividing MLA revenues with Alaska, arguably the same analysis of the provision in question would apply to a direct challenge to the authority of Congress to change the revenue shares under a particular statutory leasing regime as opposed to paying 90% as stated in the Statehood Act.

If the Statehood Act simply means that Alaska will be treated like other states under the MLA, the question may be asked whether Congress may legislate specially as to ANWR and prescribe different revenue-sharing provisions in that particular leasing context. Congress has directed a different split in the past, e.g., with respect to the National Petroleum Reserves, in which situation all of the revenues go into the federal Treasury,⁹² except for the National Petroleum Reserve in Alaska, in which instance the revenue sharing is 50/50.⁹³ Therefore, arguably Congress has flexibility regarding revenue sharing in special legislation regarding oil and gas leasing in the Refuge. Absent new provisions, revenues might either be divided as currently provided under the MLA — if leasing in ANWR is under that statute — or go to the U.S. Treasury as miscellaneous receipts under 31 U.S.C. § 3302. Issues may remain, however, because of the wording of the current bills.

Section 6512 of H.R. 4 states that notwithstanding § 6504 of the bill (which addresses lease sale procedures), the Mineral Leasing Act, or “any other law,” 50 percent of all “adjusted” (meaning, the bill states, adjusted for previous overpayments or refunds, etc.) bonus, rental, and royalty revenues from the oil and gas leasing and operations authorized by the title is to be paid to Alaska. Then a new Fund is created to spend the remaining share of *bonus* revenues and a second new Fund is created to spend the remaining share of *rent and royalty* revenues.

This language presents several issues. First, under § 6503(a), the Secretary is to establish and implement a leasing program “under the Mineral Leasing Act,” yet § 6512, notwithstanding the Mineral Leasing Act, directs a revenue-sharing program different from that in that Act. Possibly the § 6503(a) language was included to ensure that BLM not the FWS would administer the ANWR leasing program. However, establishing the ANWR leasing program under the Mineral Leasing Act, as opposed to a new, entirely separate statutory program, while also requiring a revenue split different from that pledged to Alaska in its Statehood Act regarding revenues received from leasing under the Mineral Leasing Act, arguably could raise new questions as to the validity of this approach. If a court were to find the alternative disposition of revenues invalid, then quite possibly 90% of the revenues could go to Alaska and 10% to the federal Treasury – with no funds applied to conservation purposes or for renewable energy research.

⁹¹*Id.*, at 706.

⁹²10 U.S.C. § 7433.

⁹³P.L. 96-514, 94 Stat. 2964.

Also, under § 6512, fifty percent of revenues from *bonus* payments for ANWR leases is to be deposited into the Renewable Energy Technology Investment Fund. Under § 6512(c)(2), fifty percent of revenues from rents and royalty payments from ANWR leases is to be deposited into the “Royalties Conservation Fund. It is not stated whether the base for revenue sharing is to be gross or net receipts, an issue that has been litigated in the past.

However, § 6511 of the bill provides for up to \$10,000,000 of the “amounts received by the United States” as revenues derived from rents, bonuses, and royalties to go into a new fund to alleviate coastal impacts. It is not clear how this \$10,000,000 is to relate to the 50% share of the United States that is to go into the other two new Funds. Perhaps, the \$10,000,000 comes off the top and the remainder is then divided 50% to Alaska and 50% into the other two Funds, or perhaps this is an inadvertent mistake that will be resolved.

Under § 514 of S. 388, “all revenues received” by the federal government from competitive bids, sales, bonuses, royalties, rents, fees, or interest are to be deposited into the Treasury, then Alaska’s share is to be paid and the Secretary of the Treasury is to “deposit the balance of all such revenues as miscellaneous receipts in the Treasury.” However, the Secretary is directed to deposit amounts received as bonus bids into a special fund known as the Renewable Energy Research and Development Fund. It is not clear whether bonus bids go into this Fund before the state share is taken out or afterwards, or how the amount received as bonus bids is to be earmarked during the process.

Under §514(a) of S. 388, Alaska is to receive the same percentage as paid for exploration of the National Petroleum Reserve – Alaska under P.L.. 96-514, which is 50%.

VII. Proposed Senate Amendments on ANWR.

Senate Amendment 3132. Proposed Senate Amendment (S.Amdt.) 3132, introduced by Sen. Murkowski and others, was patterned closely on the language of H.R. 4 as passed by the House, but with some differences, as discussed below. A second degree amendment, 3133, was offered by Sen Stevens to the Murkowski amendment. Neither amendment was voted on because motions to invoke cloture failed with respect to both amendments. The motion relating to S.Amdt. 3133 failed by a vote of 36 in favor to 64 against and this amendment was withdrawn.⁹⁴ The cloture motion on S.Amdt. 3132 failed by a vote of 46 in favor, to 54 against⁹⁵ and this motion is still pending.⁹⁶ The amendments are discussed here as background to any additional ANWR-related issues that might arise.

The comments on H.R. 4 discussed above pertain to S.Amdt. 3132, except as otherwise noted in light of differences in S.Amdt. 3132. The leasing provisions would

⁹⁴148 Cong. Rec. S2,890 (daily ed. April 18, 2002).

⁹⁵*Id.*

⁹⁶*Id.*, at D353.

have taken effect upon a determination and certification by the President that development of the Coastal Plain is in the national economic and security interests of the United States. This determination and certification would have been in the sole discretion of the President and are not reviewable.

The coastal plain would have been defined by a reference to its legal description in appendix I to part 37 of title 50 C.F.R., as well as to the August, 1980 map.

A requirement to consult with representatives of Kaktovik City and Inupiat Corporation was added.

Exports of ANWR oil to Israel were allowed.

The provisions for judicial review would have been changed to provide exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to hear challenges to the validity of any final order or action (including a failure to act) of any federal agency or officer under the title; the constitutionality of any provision or decision; or the adequacy of any EIS. Claims arising under the title would have had to have been brought no later than 60 days after the decision or action giving rise to the claim and the Court of Appeals was directed to provide expedited consideration. Review of a decision of the Secretary to conduct a lease sale, including the environmental analysis thereof was limited to whether the Secretary complied with the terms of the title and would have been based on the administrative record, and upheld unless the court found there was no rational basis for the Secretary's action. (This was a change from the new standard set out in H.R. 4.) It is not clear whether any other challenges might have been possible to bring or whether they would have been heard by the district court.

The reference to PLO 6959 was corrected to read paragraph 1.

A Coastal Plain Local Government Impact Aid Assistance Fund would have been established that renamed a Fund established in H.R. 4, but funded it differently. This S.Amdt. 3132 Fund was financed only from a share of the bonus bids, as opposed to coming from the bonus bids, rents, and royalties under H.R. 4. However, under S.Amdt. 3132, the Fund would have been permanently appropriated and the \$10,000,000 cap in H.R. 4 would have been eliminated.

Revenues would have been allocated differently under S.Amdt. 3132. Bonus bids would have been allocated as follows: 50% to Alaska; 1% to the Coastal Plain Local Government Impact Aid Assistance Fund; and \$10 million to the Secretary of Energy to be used to fill the Strategic Petroleum Reserve. The remainder of the balance of bonus bids was divided 50% to the Renewable Energy Technology Investment Fund and 50% into the Habitat Conservation and Federal Maintenance and Improvements Backlog Fund. These Funds are similar to ones in H.R. 4, but the last named Fund in S.Amdt. 3132 was to be permanently appropriated and to be used for some new uses that would have benefitted other federal lands, such as to "eliminate maintenance and improvement backlogs on Federal lands;" "to restore and protect uplands, wetlands, and coastal habitat;" and to provide public access and necessary facilities for visitor accommodations. Requirements to consult and coordinate with other federal agencies (similar to those required in H.R. 4 and

S.Amdt. 3132 with respect to the Renewable Energy Technology Investment Fund) would have been added in connection with the use of this latter Fund.

Rents and royalties (as opposed to bonus bids) under S.Amdt. 3132 would have been divided 50/50 between the State of Alaska and the U.S. Treasury as miscellaneous receipts.

Payments to Alaska were to be made quarterly, rather than semiannually as in H.R. 4.

Additional lands would have been added to the Mollie Beattie Wilderness area within the Refuge.

Senate Amendment 3133. Sen. Stevens proposed S.Amdt. 3133 to modify S.Amdt. 3132 in several respects.

The first lease sale would have been conducted within 8 months of enactment, rather than within 22 months as stated in H.R. 4 and S.Amdt. 3132.

The judicial review provisions would have been changed to be in accordance with §203(c), (d), and (e) of Public Law 93-153. These provisions are part of the Trans-Alaska Pipeline Act and authorize expedited judicial review, but also govern rights of way and leases, authorize waiver of any procedural requirements of law or regulations the relevant officials deem desirable to waive, and state that actions related to the Pipeline shall be taken without further action under NEPA. How these provisions would have related to the rest of the ANWR title is not clear. The provisions would have limited judicial review only to constitutional claims, claims alleging the invalidity of the section, or claims that an official acted without authority.

Revenues would have been allocated differently under S.Amdt. 3133 in that moneys from bonus bids would go 50% to Alaska; 1% to the Coastal Plain Local Government Impact Aid Assistance Fund; \$10 million to the Secretary of Energy to fill the Strategic Petroleum Reserve; and the remainder of the bonus bids balance would have been deposited into the Conservation, Jobs and Steel Reinvestment Trust Fund. Revenues from rents and royalties would be split 50% to Alaska and 50% into the Conservation, Jobs, and Steel Reinvestment Trust Fund.

Payments to Alaska would have been transferred on the 15th of each month, without further appropriation.

The Conservation, Jobs, and Steel Reinvestment Trust Fund would have been funded with phased in amounts from bonus bids as set out in new §1914, and from rents and royalties from ANWR leasing for 30 years following production. Some of the bonus bid moneys into this Fund would have gone to conservation activities and renewable energy purposes similar to those set out in S.Amdt. 3132, and for “other related authorized programs within the jurisdiction of the House and Senate Committees on Appropriations.” Other parts of the bonus bids were to be used by the Secretary of Commerce to modernize United States steel production and to finance other industry and trade related activities. Also, the Secretary of Labor could have used some of these funds for various job training and worker programs.

Funds from rents, royalties, and payments for the first 30 years of production would have gone into the Fund established by §401 of the Surface Mining Control and Reclamation Act (the Abandoned Mine Reclamation Fund for reclaiming lands damaged by coal mining), to be permanently appropriated to cover any shortfall of funds under the Combined Fund.

Provision was made for surplus funds above the amounts allocated, and for the President to request reallocation of amounts through appropriations acts.

The Secretary of State was authorized to enter into agreements with foreign countries to allow American workers to work on projects abroad that will increase production and transportation of domestic energy resources and reduce American reliance on foreign oil and natural gas.

A Steel Industry Retiree Benefits Protection program would have been established, funded from bonus bids under §1914(c). Under this program, the United States would have assumed liability for steel industry retiree benefits “subject to amounts available in the Trust Fund and additional funds made available in appropriation acts.”